Salak Land Development Sdn Bhd v Pentadbir Tanah Kuala Langat & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01–110–03 OF 2012
ABDUL WAHAB PATAIL, AZIAH ALI AND TENGKU MAIMUN JJCA
14 JANUARY 2015

Civil Procedure — Judicial review — State Authority on appeal increased compensation awarded by land administrator to landowner upon Tenaga Nasional Bhd's acquisition of right of way over part of land to build transmission line — Whether landowner failed to show State Authority's decision irrational — Whether landowner was wrong to suggest basis for determination of compensation under Land Acquisition Act 1960 ('LAA') should have been used to decide compensation under Electricity Supply Act 1990 ('ESA') — Whether court had to give effect to words used in ESA and there was no reason to import basis used in LAA into the ESA

The third respondent ('R3') issued a notice under s 11(2) of the Electricity Supply Act 1990 ('the ESA') to the appellant to acquire a right of way over part of its land to build a transmission line. The appellant objected to R3's proposed alignment and counter-proposed an alternative route over the land. The first respondent ('R1') conducted an inquiry under s 11(7) of the ESA and dismissed the appellant's objection and counter-proposal. The second respondent ('R2') allowed the appellant's appeal and ordered R3 to follow the appellant's counter-proposed route. Following an inquiry under s 16(1) of the ESA, R1 ordered R3 to pay the appellant RM1,465,968.70 as compensation. Dissatisfied with the quantum, the appellant appealed to R2 which increased the compensation to RM2,931,937.50. Still unhappy with the award, the appellant applied to the High Court for judicial review of R2's decision but the application was dismissed. In the instant appeal, the appellant contended that the High Court erred in dismissing the application because R2's decision was irrational and flawed and failed to take into account relevant factors. Inter alia, the appellant said R2 failed to consider matters provided for under s 2, particularly s 2(c) and (d), of the First Schedule to the Land Acquisition Act 1960 (' the LAA'). The premise for the appellant's argument was that land 'acquired' for use under s 11 of the ESA should be treated on par with compulsorily acquired land and therefore the LAA and cases decided thereunder concerning payment of compensation were relevant and applicable. The appellant submitted that because the valuation report it had submitted for determination of the compensation payable was unchallenged, it had made out a prima facie case that R2's compensation award was insufficient. The appellant argued that under the LAA, market value of land could be

determined by the comparison method of valuation and this was the method used in its valuation report. The appellant submitted that while compensation at RM5.12 per square foot was paid in 1997 for compulsory acquisition of a portion of the same land under the LAA, in the instant case R2's award, made in 2010, was only RM1.16 per square foot.

Held, dismissing the appeal with costs:

(1) For the court to exercise its supervisory jurisdiction in judicial review, the applicant had to show there was an error affecting merits; that it was not a mere error but one so incapable of explanation that it could only be termed irrational. The award in 1997 was in respect of a land acquisition whereas the 2010 award was in respect of compensation determined under s 16 of the ESA in respect of a notice under s 11(1). The appellant in this case did not lose the land as in an acquisition but only as to the use of the land for agriculture. The comparison with the 1997 award was not apple to apple. The difference alone could not be the basis of any conclusion. In failing to demonstrate on an apple to apple basis, the appellant failed to show that the loss of use for agricultural purpose amounted to an amount so much higher than RM1.16 per square foot such that that difference could not be explained (see paras 23 & 24).

(2) The court's primary duty was to give effect to the intention of the legislature in the words used by it. The court found in the words used in ss 11 and 16 of the ESA no reason to import into the ESA the basis used in the LAA for determination of compensation (see para 25).

[Bahasa Malaysia summary

Responden ketiga ('R3') mengeluarkan notis di bawah s 11(2) Akta Bekalan Elektri 1990 ('ABE') kepada perayu untuk memperolehi hak jalan ke atas sebahagian daripada tanahnya untuk membina talian penghantaran. Perayu membantah kepada cadangan penjajaran R3 dan mencadang balas jalan alternatif ke atas tanah tersebut. Responden pertama ('R1') menjalankan siasatan di bawah s 11(7) ABE dan menolak bantahan dan cadangan balas perayu. Responden kedua ('R2') membenarkan rayuan perayu dan memerintah R3 untuk mengikut jalan cadangan balas perayu. Berikutan siasatan di bawah s 16(1) ABE, R1 memerintahkan R3 untuk membayar perayu sebanyak RM1,465,968.70 sebagai pampasan. Tidak puas hati dengan kuantum tersebut, perayu merayu kepada R2 yang menambahkan jumlah pampasan kepada RM2,931,937.50. Masih tidak berpuas hati dengan *award*, perayu memohon kepada Mahkamah Tinggi untuk semakan kehakiman keputusan R2 tetapi permohonan tersebut ditolak. Dalam rayuan ini, perayu berhujah bahawa Mahkamah Tinggi tersilap dalam menolak permohonan kerana keputusan R2 adalah tidak rasional, cacat dan gagal untuk mengambil kira faktor-faktor relevan. Antara lain, perayu menyatakan bahawa R2 gagal untuk mempertimbangkan perkara yang diperuntukan di bawah s 2,

terutamanya s 2(c) dan (d), Jadual Pertama kepada Akta Pengambilan Tanah 1960 ('APT'). Asas untuk hujahan perayu adalah bahawa tanah 'acquired' untuk penggunaan di bawah s 11 ABE patut dianggap setanding dengan tanah yang diambil secara wajib dan oleh itu APT dan kes-kes yang telah diputuskan di bawahnya berkaitan bayaran pampasan adalah relevan dan boleh digunapakai. Perayu berhujah oleh sebab laporan penilaian yang dimasukkannya untuk penentuan bayaran pampasan tidak dicabar, ia telah membuat kes prima facie bahawa award pampasan R2 adalah tidak mencukupi. Perayu berhujah bahawa di bawah APT nilai pasaran tanah boleh ditentukan dengan cara perbandingan penilaian dan ini adalah cara yang digunakan di dalam laporan penilaiannya. Perayu berhujah bahawa sementara pampasan pada RM5.12 setiap sekaki dibayar pada tahun 1997 untuk pengambilan tanah secara wajib terhadap bahagian tanah yang sama di bawah APT, dalam kes ini award R2, dibuat pada tahun 2010, hanya RM1.16 setiap sekaki.

Diputuskan, menolak rayuan dengan kos:

(1) Untuk mahkamah melaksanakan bidang kuasa pengawasannya dalam semakan kehakiman, pemohon hendaklah menunjukkan terdapat kesilapan yang menjejaskan merit; bahawa ia bukan sahaja kesilapan tetapi satu yang tidak dapat dijelaskan bahawa ia hanya boleh dimaksudkan tidak rasional. Award 1997 adalah berkaitan pengambilan tanah sementara award 2010 adalah berkaitan pampasan yang ditentukan di bawah s 16 ABE berkenaan notis di bawah s 11(1). Perayu dalam kes ini tidak hilang tanah sebagai dalam pengambilan tanah tetapi hanya kepada penggunaan tanah untul pertanian. Perbandingan dengan award 1997 bukan setanding. Perbezaan itu sendiri tidak menjadi asas apa-apa kesimpulan. Dalam kegagalan untuk menunjukkan dasar setanding, perayu gagal untuk menunjukkan bahawa kerugian penggunaan untuk tujuan pertanian menjadikan kepada amaun yang lebih tinggi daripada RM1.16 setiap sekaki di mana perbezaan sedemikian tidak dapat dijelaskan (lihat perenggan 23 & 24).

(2) Tugas utama mahkamah adalah untuk memberi kesan kepada niat Perundangan dalam perkataan-perkataan yang digunakannya. Mahkamah mendapati perkataan-perkataan yang digunakan di dalam ss 11 dan 16 ABE tiada sebab untuk dimasukkan ke dalam ABE asas yang digunakan di dalam APT untuk penentuan pampasan (lihat perenggan 25).]

Notes

For cases on judicial review in general, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5317–5344.

Cases referred to

B A Rao & Ors v Sapuran Kaur & Anor [1978] 2 MLJ 146, FC (refd)
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)
Ismail bin Abdullah v Tenaga Nasional Berhad [2010] MLJU 1616; [2011] 3 CLJ 770, CA (refd)
See Kok Kol v Chong Kui Seng & Ors [2010] 2 CLJ 481, CA (folld)
PP v Tan Tatt Eek & Other Appeals [2005] 2 MLJ 685; [2005] 1 CLJ 713, FC (refd)
R Rama Chandran v Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1, FC (refd)
Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd [2002] 2 MLJ 707; [2002] 3 CLJ 624, CA

Legislation referred to

Courts of Judicature Act 1964 s 72
Electricity Supply Act 1990 ss 11, 11(2), (4), (7), 16, 16(1), (2)
Federal Constitution art 13
Land Acquisition Act 1960 ss 11, First Schedule s 1, Second Schedule ss 2(c) & (d), Third Schedule ss 2(1) & (3)
Rules of the High Court 1980 O 53 r 3(2)

Appeal from: Application for judicial review No 25–135–2011 (High Court, Shah Alam)

Paari Perumal (K Jayaratnam with him) (Jayaratnam & Partners) for the appellant.
Ahmad Fuad bin Othman (Selangor Assistant Legal Advisor) for the first and second respondents.
Gurmel Singh (Belvinder Singh Kenth) for the third respondent.

Abdul Wahab Patail JCA:

[1] The applicant Salak Land Development Sdn Bhd ('the appellant') had applied for the remedies, inter alia, of certiorari, mandamus, declarations and injunctions under judicial review under O 53 r 3(2) of the Rules of the High Court 1980 in respect of the decision of the second respondent Pihak Berkuasa Negeri Selangor ('the second respondent') made on 14 July 2011, awarding the appellant compensation in the sum of RM2,931,937.50 and dismissing

A '*tuntutan pampasan bagi tanah sterile, tanah terasing dan zon penampan*' under an appeal by the appellant pursuant to s 16(2) of the Electricity Supply Act 1990 ('the 1990 Act') against the decision of the first respondent Pentadbir Tanah Kuala Langat ('the first respondent') under s 16(1).

B BACKGROUND

[2] The third respondent, Tenaga Nasional Bhd ('the third respondent') had issued a 'Notis Kemasukan' (first schedule notice) dated 22 August 2008 under s 11(2) of the 1990 Act to the appellant, the registered owner of a land C held under Hakmilik HS (D) 5289, Lot No PT 8959, Mukim Tanjung Dua Belas, Daerah Kuala Langat, Selangor Darul Ehsan, to acquire a 3 chain wide right of way over a part of the land to construct a 275kV Loop In Loop Out Transmission Line from Olak Lempit Hicom to Bukit Baja Main Intake Substation.

D

[3] Pursuant to s 11(4) of the 1990 Act, the appellant by letter dated 15 September 2008, objected to the alignment proposed by TNB in the said first schedule notice dated 22 August 2008 and made a proposal for the realignment of the same by offering an alternative route over the said land.

E

[4] The first respondent conducted an inquiry under s 11(7) of the 1990 Act on 4 December 2008, it made a Second Schedule order wherein the appellant's objection to the third respondent's alignment and the appellant's realignment proposal was dismissed.

F

[5] The appellant appealed to the second respondent and by letters 6 May 2009 and 5 August 2009, the parties were informed that the second respondent had allowed the appellant's appeal and that the third respondent was to realign its rentice in accordance to the route proposed by the appellant. Pursuant to an G inquiry on 8 September 2010, under s 16(1) of the 1990 Act, the first respondent ordered the third respondent to pay compensation in the sum of RM1,465,968.707. The appellant appealed to the second respondent against the first respondent's award. The second respondent varied the award by increasing it to RM2,931,937.50. The appellant's application for judicial H review of the decision by the second respondent was dismissed by the High Court on 17 February 2012.

I

SUBMISSIONS FOR THE APPELLANT

[6] The appellant's complaint was directed at the assessment process employed by second respondent. It was submitted that it was flawed, failed to take into account relevant factors, and wholly unreasonable. It was submitted that the High Court erred in dismissing the appellant's application for judicial review in that it failed to appreciate that the second respondent failed to take into consideration relevant factors and misconstrued the applicable sections of the 1990 Act.

[7] Shorn of the redundant language, the point made was:

(a) neither the first nor the second respondent chose to file any affidavit in reply and therefore all averments made in the affidavits filed by the appellant are deemed to be admitted by the first and second respondents;

(b) the appellant submitted a valuation report for the purpose of calculation of compensation payable under s 16(2) of the 1990 Act, and there was no alternative valuation report produced by any of the respondents to challenge it;

(c) the second respondent only considered the directly affected land but failed to take into account the other portion of lands to be affected and which cannot be used by the appellant, and there is no evidence the matters to be considered in determining compensation as provided under s 2, particularly s 2(c) and (d) of the First Schedule to the Land Acquisition Act 1960 ('the 1960 Act') was considered.

[8] The reference by the appellant to Land Acquisition Act arose from *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707; [2002] 3 CLJ 624 (CA) where the Court of Appeal addressed s 11 of the 1960 Act. The submission proceeded to art 13 of the Federal Constitution, the book *Principles of Statutory Interpretation* by Guru Prasanna Singh (11th Ed, 2008) at p 133, and came back to that:

(a) the '... construction to be placed on the word 'compensation' in s 16 of the 1990 Act is consistent with the words 'full compensation' in s 11 of the 1990 Act; and

(b) the full compensation is to be paid for the actual loss of the lands caused by reason of disturbance, damage or disability as outlined in the valuation report submitted by the appellant.

[9] The submission went back to:

(a) *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* that the Court of

Appeal had determined that lands intended to be used under s 11 of the 1990 Act is to be treated as a compulsory acquisition, and that being the case, the 1960 Act and cases decided thereunder for compensation would be relevant;

(b) that the appellant has made out a prima facie case of inadequate award because the only evidence is the appellant's valuation report contrary to the requirement in ss 2(1) and s 2(3) of the Third Schedule of the 1960 Act;

(c) the determination of the market value of the affected land is outlined in Section 1 to the First Schedule to Act 1960, that the valuer may use any suitable method of valuation to arrive at the market value, that the comparison method is one such accepted method of valuation and has been used in the appellant's valuation report; and that in an earlier acquisition of 15.473 hectares of the same land in 1997 by *gazette* notification No.371 dated 24 April 1997 the award was RM5.12 per sq. foot.

[10] The submission for the appellant also addressed the question raised by the third respondent whether the compensation awarded can be questioned by way of a judicial review application. It was submitted:

(a) in the light of the Federal Court decisions in *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 and *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1, judicial review now allows for review not only of the decision making process but the decision also;

(b) the High Court misunderstood *Ismail bin Abdullah v Tenaga Nasional Berhad* [2010] MLJU 1616; [2011] 3 CLJ 770 CA in concluding that the decision of the second respondent pursuant to s 16(2) of the 1990 Act is final.

[11] The second respondent had raised the argument that public policy demanded that the deliberations of the second respondent in respect of s16(2) is barred by the need for secrecy. It was submitted, relying on *B A Rao & Ors v Sapuran Kaur & Anor* [1978] 2 MLJ 146; *See Kok Kol v Chong Kui Seng & Ors* [2010] 2 CLJ 481 that the High Court erred to have said that public policy demands that the decision of the second respondent not be reviewed on account of it being secret without any evidence being presented. The appellant sought to distinguish *Ismail bin Abdullah v Tenaga Nasional Berhad* on the ground that the Court of Appeal did not have the benefit of the decision of the Federal Court in *B A Rao*.

Reasoning and Decision

[12] The appeal before this court was in respect of the dismissal by the High Court of an application for judicial review.

[13] It must never be overlooked that judicial review is about the exercise of a supervisory jurisdiction of the court as distinct from its appellate jurisdiction. Appellate jurisdiction concerns appeals from the courts in whom is placed judicial authority. Appellate jurisdiction may also extend to the decisions of an authority, body or person if the legislation provides that an appeal therefrom lies to the court. But where a power or discretion is assigned to such authority, body or person, and there is no provision that an appeal therefrom lies to the court, it means that the Legislature did not intend that an appeal may lie to the courts, and that the exercise of the power or discretion given to that authority, body or person is subject only to the supervisory jurisdiction of the court.

[14] The locus classicus on when the supervisory jurisdiction of judicial review is exercised is *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL). In that case, Lord Diplock reviewed the common law on judicial review and categorised the instances warranting judicial review as illegality, procedural impropriety and irrationality, with a possible fourth ground as proportionality. The first, illegality, is obvious. The second, procedural impropriety, was the category of cases from which arose the notion that in judicial review the court examines the decision making process and not the decision itself. The third ground, irrationality, established that the notion is not entirely correct. It, however, warrants precise explanation. It does not, of course, refer to the rationality or the absence of it on the part of the decision maker. Although it examines the decision itself, it has nothing to do with the question whether the decision maker, as in an appellate jurisdiction, had erred, and per s 72 of the Courts of Judicature Act 1964, that error affected the merits of the decision. In the supervisory jurisdiction the court must determine if the authority, body or person given the power or discretion had so erred that the decision cannot be explained and therefore can only be described as irrational. That approach as to the supervisory jurisdiction respects the law passed by the Legislature to give the power or discretion to make the decision to the authority, body or person, while reserving the power to ensure that the power or discretion is exercised by that authority, body or person as intended by the Legislature and is not abused.

[15] 'Proportionality' is a concept not born of the common law but the continental European, and sometimes termed the occidental, system. It is arguably superfluous as there is already 'irrationality' for decisions so out of proportion that it can only be described as irrational. The danger is that if treated as a separate category, 'proportionality' could erode the boundary of the

supervisory jurisdiction and lead to inadvertent interference with powers and discretion specifically assigned by the Legislature to a specific authority, body or person.

[16] Be that as it may, the decisions of the Federal Court in *R Rama Chandran v Industrial Court of Malaysia* [1997] 1 MLJ 145; [1997] 1 CLJ 147 and *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 reflect the considered enunciation of the law in the supervisory jurisdiction.

[17] In this appeal before this court, the District Land Administrator's order under s 11(7) dated 4 December 2008 shows:

> TNB setuju membayar pampasan dengan nilaian pasaran semasa dan ikut syarat nyata tanah [illegible] iaitu pertanian.

[18] There was no appeal to the State Authority within 21 days against that decision. The determination dated 24 August 2010 in the Form in the Third Schedule by the District Land Administrator under s 16(1) stated as to compensation:

> Hilang Upaya Tanah RM1,465,968.70

[19] The decision of the State Authority in the appeal to it, was conveyed by the letter dated 14 July 2011 by the Ketua Penolong Pegawai Daerah (Tanah) on behalf of the Pegawai Daerah Kuala Langat. The State Authority increased the compensation to RM2,931,937.50 and dismissed the claim for compensation for '*tanah sterile, tanah terasing dan zon penampan*.'

[20] Compensation under the 1990 Act is provided under s 16 as follows:

> 16(1) The amount of compensation, if any, payable under section 11 or 13 shall be assessed by the District Land Administrator after such enquiry as he shall deem sufficient. The assessment shall be substantially in the form set out in the Third Schedule:
>
> Provided further that no compensation shall be payable by the licensee in respect of any tree within fifty feet of the centre line of any road constructed or maintained by the State Government or by any local authority unless it is proved that the tree was in existence prior to the construction of the road.
>
> (2) Any person aggrieved with the District Land Administrator's assessment may within twenty-one days after the assessment appeal to the State Authority whose decision shall be final.

[21] Although the decision of the State Authority is final, the appellant has a right to resort to the supervisory jurisdiction of the Court to examine the decision of the State Authority as to whether there is illegality, procedural impropriety or irrationality.

[22] We observed that regardless of any error in the basis of the decision of the District Land Registrar, the compensation has been decided upon by the State Authority. Section 16 of the 1990 Act had, on the face of it, been complied with. Indeed, it was not the appellant's case there was illegality or procedural impropriety. That being so, the only foundation for judicial review that remained was irrationality.

[23] The appellant's submission was that in a land acquisition under the Land Acquisition Act 1960 in 1997, the compensation awarded was RM5.12 psf, whereas the award by the State Authority in 2010, the subject of the application for judicial review, is RM1.16 psf. It does appear, on the face of it, that there could be something wrong in that decision. But be it in the appellate or the supervisory jurisdiction, it must first be demonstrated there was an error affecting the merits, and in the supervisory jurisdiction it must be demonstrated that it was no mere error, but the error is so incapable of explanation that it can only be termed irrational.

[24] We observed that the award in 1997 was in respect of a land acquisition, whereas the 2010 award was in respect of compensation determined under s 16 in respect of a notice under s 11(1). The appellant in this case did not lose the land as in an acquisition, but only as to the use of the land for agriculture. The comparison with the 1997 award was not apple to apple. The difference alone cannot be the basis of any conclusion. In failing to demonstrate on an apple to apple basis, the appellant failed to demonstrate that the loss of use for agricultural purpose amounted to amount so much higher than the RM1.16 psf such that that difference cannot be explained.

[25] In *Public Prosecutor v Tan Tatt Eek & Other Appeals* [2005] 2 MLJ 685; [2005] 1 CLJ 713 (FC), it was held by the Federal Court that the primary duty of the court is to give effect to the intention of the legislature in the words used by it. It is a well-established canon of interpretation that the intent of the legislature in the words used by it in their natural and ordinary sense. We find in the words of ss 11 and 16 no reason to import into the 1990 Act the basis of determination of compensation in the Land Acquisition Act.

[26] The foregoing reasons necessarily led this court to dismiss the appeal with costs, which was agreed to be at RM5,000 to the first and the second respondents, and similarly to the third respondent. We order the deposit to account of costs.

Appeal dismissed with costs.

Reported by Ashok Kumar